87-1719

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, and its LOCAL 1865,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Armco Inc. acquired a coke facility and integrated that facility into the production process of Armco's steel works. Armco treated the newly integrated coke department as an accretion to the steel works bargaining unit represented by the United Steelworkers of America. However, the National Labor Relations Board held that the coke department constituted an appropriate separate bargaining unit, and that Armco and the Steelworkers had violated the National Labor Relations Act in treating the coke department as an accretion to the Steelworkers unit. The Court of Appeals enforced the Board's order in pertinent part. The questions presented are:

1. Whether the National Labor Relations Board may properly carve out as a separate bargaining unit a department that comprises one stage of a functionally integrated production process, where to do so gives the employees in that unit unfair leverage over the entire production process and over the vast majority of the employees in the facility as a whole.

2. Whether a unit can be found to be appropriate for collective bargaining on the basis of a past bargaining history, where that history derives from the unit's previous status as an independent plant and the unit has subsequently been purchased by another employer and integrated into that employer's operations in a different industry.

PARTIES TO THE PROCEEDING

Petitioner United Steelworkers of America, AFL-CIO, along with its Local 1865, was a petitioner and cross-respondent in the Court of Appeals and a respondent before the National Labor Relations Board ("Board"). Armco Inc., petitioner in this Court in No. 87-1514, was also a petitioner and cross-respondent in the Court of Appeals and a respondent before the Board. In addition to the foregoing parties, the Oil, Chemical and Atomic Workers International Union was a charging party before the Board and an intervenor in the Court of Appeals, and the Board was a respondent and cross-petitioner in the Court of Appeals.

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UNITED STEELWORKERS OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

United Steelworkers of America, AFL-CIO, and its Local 1865 (hereinafter collectively "USWA") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 832 F.2d 857 and is reproduced in the Appendix at App. 1a-16a. The decision of the National Labor Relations Board (279 NLRB No. 143, May 30, 1986), including the decision of the administrative law judge, is not yet officially reported, and is reproduced in a supplemental appendix submitted jointly by Armco, Inc. in No. 87-1514 and by the Steelworkers in this case.

JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987. Timely petitions for rehearing were

denied on February 4, 1988. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent portions of sections 8(a)(1), (2), (3), and (5), 8(b)(1)(A) and (b)(2), and 9(a) and (b) of the National Labor Relations Act, as amended, 29 U.S.C. §§ 158(a)(1), (2), (3), and (5), 158(b)(1)(A) and (b)(2), and 159(a) and (b), are set forth at App. 17a-18a.

STATEMENT OF THE CASE

USWA adopts the statement of the case of petitioner Armco Inc. in its petition for certiorari at No. 87-1514. We set forth the following brief summary to highlight the facts critical to the questions presented in this petition for certiorari.

More than 3,000 production and maintenance employees at Armco's Ashland Steel Works have for many years been represented by USWA. As is the case in the steel industry generally, those employees are all part of one facility-wide bargaining unit, reflecting the integrated nature of the continuous production process that characterizes a steel works. On December 31, 1981, Armco purchased from Allied Corporation for $100,000,000 Allied's nearby Ashland coke facility. That facility had theretofore been operating as an independent entity, selling coke on the open market, but the enterprise was failing economically. Allied, which was losing one and a half million dollars a month from its coke operation, had placed the facility on the market, but apart from Armco there were no interested potential buyers.

Upon acquiring the coke facility, Armco hired its approximately 130 active employees (250 more were on layoff at the time). By its acquisition of the facility Armco obtained for the first time a dependable internal supply of coke which it could transport immediately, while still warm, to fuel its blast furnaces. For compelling reasons

of efficiency, Armco integrated the new coke department into its continuous process of steel manufacturing. Like the various segments of an assembly-line, the production of each department at the Ashland Works depends on that of the departments before it in the production sequence, and all now depend upon the continued production of the coke department, which is at the front end of this tightly integrated steel fabrication process.

To coordinate this production process, Armco also integrated the coke department into the management and labor relations structure of the Ashland Works; and in conjunction with the complete integration of the coke department into the Ashland Works, Armco and USWA agreed that USWA would represent the coke workers as part of the existing facility-wide USWA bargaining unit. In entering into that agreement, USWA and Armco believed that the new coke department represented an "accretion" to the USWA unit.

Months after Armco's acquisition and assimilation of the coke department, the Oil, Chemical and Atomic Workers International Union ("OCAW"), which had represented the coke workers when they were employed by Allied, filed unfair labor practice charges with the National Labor Relations Board ("Board") against Armco, and later against USWA. OCAW charged, *inter alia*, that Armco had violated the Act by recognizing USWA as the bargaining agent for the coke employees, and that USWA had violated the Act by accepting recognition. After an evidentiary hearing, the Administrative Law Judge ("ALJ") sustained the charges on the grounds that the coke department constituted a separate appropriate unit and was therefore not an accretion to the USWA unit.[1] The Board adopted the ALJ's decision, with certain exceptions not relevant here.

[1] The ALJ also found that Armco and USWA had unlawfully required coke plant employees to execute USWA dues checkoff and authorization cards as a condition of employment. That finding,

The Court of Appeals for the Sixth Circuit enforced the Board's order in pertinent part.[2] The court relied heavily upon the bargaining relationship between OCAW and Allied that had existed when the coke facility was an independent operation, holding that "[t]his fact alone suggests the appropriateness of a separate bargaining unit." App. at 11a. While "recogniz[ing] that the relatively small size of the coke workers bargaining unit creates a possibility of unfair leverage," App. at 15a, the Court of Appeals nonetheless upheld the Board's decision.

REASONS FOR GRANTING THE WRIT

Summary

The decision below flies in the face of precedent and economic reality by failing to recognize that the continuous, integrated nature of the manufacturing process at Armco, and the critical role of the coke department at the front end of that continuous process, create an indivisible community of interest between the coke department and the rest of the steel works which mandates a facility-wide bargaining unit. The failure of the Board and the Court of Appeals to comprehend that reality, and their resulting approval of an unprecedented separate bargaining unit within a continuous-process manufacturing facility, conflicts with decisions of the Fourth and Seventh Circuits, *NLRB v. Harry T. Campbell Sons' Corp.*, 407 F.2d 969 (4th Cir. 1969); *Continental Web Press, Inc. v. NLRB*, 742 F.2d 1087 (7th Cir. 1984), and saddles the Ashland Works with an economically unworkable dual-unit structure that does not exist in any other steel works in the country.

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affirmed by the Board and the Court of Appeals, is not at issue in this petition.

[2] The Court declined to enforce one aspect of the Board's remedial order—the backpay order against Armco—and remanded that matter to the Board (App. 15a-16a).

The error of the Board and the Court of Appeals in minimizing the importance of the integrated manufacturing process is compounded by the exaggerated weight they accorded to other factors in making the unit determination, particularly the past bargaining history of the coke workers. Only by turning a blind eye to the fundamental economic characteristic of the *present* coke department—its critical role at the front end of a continuous steel manufacturing process—could the Board and the court grant decisive significance to the *past* history of the coke workers while employed by a different employer in a different industry. This reliance on a defunct bargaining history conflicts with the Seventh Circuit's decision in *NLRB v. Indianapolis Mack Sales & Service, Inc.*, 802 F.2d 280 (7th Cir. 1986).

Together these analytical flaws have resulted in the creation of an unprecedented separate bargaining unit within an integrated heavy manufacturing facility. The consequence is to place Armco's productive capacity, and the interests of the overwhelming majority of its workers, at the mercy of a small minority of employees in the coke department, and to negate the entire economic basis of Armco's acquisition of the coke facility. More importantly, the analysis of the Board and the Sixth Circuit, if adhered to by the Board or followed by other circuits, would confound the process of unit determination in every case involving the acquisition and integration of production facilities by employers in the heavy manufacturing sector. The practical significance of the decision here, as well as its departure from established, well-grounded precedent, renders the case worthy of this Court's review.

I. THE DECISION BELOW, BY FAILING TO ACCORD PIVOTAL SIGNIFICANCE TO THE FACT THAT THE OPERATIONS IN QUESTION ARE PART OF A CONTINUOUS MANUFACTURING PROCESS, IS IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS, AND IGNORES ECONOMIC REALITY.

1. Under settled precedent, the existence of a continuous manufacturing process, such as an assembly line or analogous straight-line production process, has been of critical significance in bargaining unit determinations under the Act,[3] and efforts to carve out a separate bargaining unit composed of one segment of a continuous production process have uniformly been rejected in heavy manufacturing industries.[4] The reasons that underlie this line of decisions were well explained by the Court of Appeals for the Fourth Circuit in rejecting a separate unit for a group of calcite workers in an integrated stone quarry:

> Because of the integrated and interdependent nature of the Texas operations a labor dispute at calcite

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[3] *See, e.g., E.I. DuPont Co.*, 205 NLRB 552, 554 (1971) ("high degree of functional integration between the sulphuric acid department and the operations of the entire plant"); *U.S. Plywood-Champion Papers*, 174 NLRB 292, 295 (1969) ("the integrated nature of the operations"); *Radio Corp. of America*, 173 NLRB 440, 445 (1968) ("employees in the units sought . . . are highly integrated into the production functions of the Company . . . [and] essential to the production output of the [entire] plant . . . ."); *Mobil Oil Corp.*, 169 NLRB 261 (1968) ("high degree of integration . . . between the powerhouse functions and the storage and distribution operations . . . .").

[4] *See, e.g., Noranda Aluminum*, 186 NLRB 217, 218 (1970); *National Tube Co.*, 76 NLRB 1199 (1948) (overruled in part by *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966)); *Geneva Steel Co.*, 57 NLRB 50, 55-56 (1944); *Sheffield Steel Corp.*, 43 NLRB 956, 959 (1942); *Tennessee Coal, Iron & R.R. Co.*, 39 NLRB 617 (1942); *Inland Steel Co.*, 34 NLRB 1294, 1299 (1941); *National Tube Co.*, 33 NLRB 1248, 1252 (1941); *Wheeling Steel Corp.*, 8 NLRB 102, 108 (1938). *See also* cases cited in n.3 *supra* and n.5 *infra*.

> would undoubtedly severely disrupt the operations of the remaining facilities, causing economic hardship to employees not involved in the dispute but dependent upon the uninterrupted functioning of the quarry operation. This is neither the encouragement of stable collective bargaining nor is it collective freedom of choice as contemplated by the Act.

NLRB v. Harry T. Campbell Sons' Corp., 407 F.2d 969, 979 (4th Cir. 1969). Similarly, the Court of Appeals for the Seventh Circuit refused to permit the creation of a separate bargaining unit for workers at one "stage[] in a single lithographic production process":

> Like Continental Web we find it difficult to understand why there should be separate units for pressmen and preparatory employees. . . . It is as if the Board had said that the workers at the beginning of an assembly line belong in a different bargaining unit from the ones at the end; for preparation and printing are successive stages in a single lithographic production process.

Continental Web Press, Inc. v. NLRB, 742 F.2d 1087, 1091 (7th Cir. 1984).

In these precedents, the crucial fact was the ability of a separate bargaining unit within the integrated facility to shut down or disrupt operations in the facility as a whole, to the detriment of the employer and the other employees.[5] The Sixth Circuit recognized that this case presents that very "possibility of unfair leverage" by the coke workers against Armco and the large majority of its employees. App. at 15a. But the court failed to recognize that this fact goes to the very heart of the

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[5] As the Board has put it in prior cases, a separate unit is highly disfavored where "any work stoppage [in the proposed separate unit is] likely to have an immediate and adverse impact on the Employer's production operations." *Motor Wheel Corp.*, 234 NLRB 358, 361 (1978); *Noranda Aluminum, supra*; *Sheffield Steel Corp., supra*, 43 NLRB at 959. *See also* cases cited in nn. 3 and 4, *supra*.

bargaining unit determination, and mandates a facility-wide unit. The court's failure in this regard places it in conflict with the decisions of the Fourth and Seventh Circuits cited above.

The unprecedented nature of the decision in this case, and its untenable economic ramifications, are highlighted by the fact that in no other steel works in the country is the coke department treated as a separate bargaining unit. Under the Sixth Circuit's decision, the Ashland Works and its employees will become the only mill in the steel industry—and virtually the only mill in heavy manufacturing industries generally—that must deal with a separate bargaining unit at the front end of its integrated production process.

Certiorari should be granted to eliminate the inconsistency between the approach to this issue adopted by the Board and the Sixth Circuit in this case, and the approach that has heretofore been applied in unit determination in industries involving functionally integrated production processes.

II. IN ACCORDING CRITICAL SIGNIFICANCE TO THE PAST BARGAINING HISTORY OF THE COKE WORKERS UNDER A DIFFERENT EMPLOYER IN A DIFFERENT INDUSTRY, THE ANALYSIS OF THE DECISION BELOW IS IN CONFLICT WITH THAT OF THE SEVENTH CIRCUIT.

It is clear why the factor of functional integration has been and should be given decisive importance in unit determinations under the Act: it is a matter that goes to the heart of the economic enterprise, and hence to the community of interests among the employees of the facility.[6] The Board and the Court of Appeals, however,

[6] From its early days the Board has recognized that "the chief object [in a unit determination] . . . is to join in a single unit only employees, and all such employees, as have a mutual interest in the

subordinated that factor in this case to such immaterial considerations as the fact that "the coke plant continues to maintain its own telephone exchange, credit union, and time clock," App. at 11a, and the fact that there is not a great deal of employee interchange between the coke department and other departments. *Id.*[7] This exaltation of the irrelevant reached its zenith in the Court of Appeals' reliance on the fact that "[f]ormerly, the coke workers unit was an independent, separate plant with a long bargaining history and a long union relationship," *id.*—a fact which, in the Sixth Circuit's view, "alone suggests the appropriateness of a separate bargaining unit." *Id.*

The Court of Appeals' reliance on the coke workers' *past* as an independent bargaining unit "begs the question," *NLRB v. Indianapolis Mack Sales & Service, Inc.*, *supra*, 802 F.2d at 285, and reflects once again the

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objects of collective bargaining." 3 N.L.R.B. Ann. Rep. 174 (1938). *See also Continental Web Press, Inc. v. NLRB*, *supra*, 742 F.2d at 1089-1090 (Posner, J.) (observing that although the governing standard is "community of interest," the Board has neither "tried to give [the term] a precise meaning" nor "explained the purpose behind the formula").

[7] The uncontroverted record evidence shows—and the Board and the Court of Appeals did not dispute—that a similar level of employee interchange exists as between *any* two departments of a steel works; and the same holds true with respect to the Court's observation that coke department jobs and jobs in other departments involve "dissimilar skills, duties, and working conditions." App. at 10a. In prior cases, the Board has recognized that it is often "not contemplated that there will be much interchange" of employees from one department to another in an integrated manufacturing facility, and that this fact is simply less "compelling," for purposes of unit determination, than the fact of functional integration. *Noranda Aluminum*, *supra*, 186 NLRB at 218. *See also McGraw Edison Co.*, 182 NLRB 852, 853 (1970) ("absence of such interchange, because of special and different skills, may mean only allocation of different duties as in different departments under a single roof," and does not warrant splintering the bargaining unit).

court's refusal to consider the economic realities involved in Armco's acquisition and integration of the coke facility. Quite simply, the coke workers' previous employment in a failing independent plant in the *coke* industry is of no relevance in determining an appropriate bargaining unit now that the coke facility has been absorbed into a manufacturing complex in the *steel* industry. The purchase and integration of the coke facility into the Ashland Steel Works brought with it a fundamental change in the coke workers' circumstance: they are now an integral part of a major facility in the basic steel industry, and their interests are inextricably bound up with those of the other employees in that facility. And, equally to the point, the coke workers' new employer, as part of the basic steel industry, must cope with an entirely different constellation of concerns than were presented to Allied in its relationship with OCAW, not the least of which is the vulnerability entailed by the separate representation of one department at the front end of Armco's continuous manufacturing process. *See supra* pp. 6-8.

The reliance of the Board and the Court of Appeals on the defunct bargaining relationship between Allied and OCAW conflicts, once again, with the cogent reasoning of the Seventh Circuit, which recently chastized the Board in a similar context for focusing too narrowly upon the bargaining history of a group of employees with their former employer. *NLRB v. Indianapolis Mack Sales & Service, Inc., supra*, 802 F.2d 280. As that court recognized:

> A bargaining unit may have been in existence for some time before the change in ownership. However, the issue here is one of successorship, so that the Board must determine whether the unit was appropriate and remains so in the alleged successor. *It begs the question to rely on the bargaining history of the predecessor alone . . . .*

Id. at 285 (emphasis added). The Sixth Circuit made precisely that error here.

III. THE DECISION BELOW HAS IMPORTANT PRACTICAL IMPLICATIONS AND MERITS REVIEW BY THIS COURT.

As we have shown, the decision below marks a sharp break from precedent in failing to accord decisive weight to the fact that the separate bargaining unit approved by the Board and the court constitutes one stage of a functionally integrated production process (*supra*, pp. 6-8), and in according significant weight to a past bargaining history in a different industry, which is now defunct and immaterial (*supra*, pp. 8-10). In this case, the result of the faulty analysis adopted by the Board and the court is an unworkable dual bargaining unit which is unprecedented in the basic steel industry, and in heavy manufacturing industries generally. For future cases, the implications if this decision is not reversed are extremely unfortunate.

The entire point of Armco's acquisition of the coke facility was that that facility, which could not survive economically as an independent plant, *could* survive if it were absorbed into the steel works and operated as an integral component of the steel works' production process. Thus, Armco's decision to integrate the coke facility into the overall operations of the steel works was the very essence of the company's decision to purchase the facility.[8] By disregarding this fact and requiring Armco to treat the coke department as a separate bargaining unit, the decision below nullifies the entire economic basis

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[8] Armco's Corporate Director of Industrial Relations explained that Armco had determined as a matter of "fundamental economics" that it would make sense to purchase the coke facility if, but only if, the facility could be operated as an integral department of the steel works, and as part of the overall steel works bargaining unit, rather than as a separate facility (Tr. 291-292).

of Armco's acquisition of the facility.[9] And, as discussed, the effect of this decision is to place all the operations of the steel works, and the interests of the thousands of employees who work there, at the mercy of the relatively small number of coke workers, who now have the power to shut down or disrupt the operations of the entire works.

If such an approach is followed in future cases, equally untenable results can be expected. Put simply, in this era of industrial change and realignment, an approach to unit determination which accords greater weight to the location of time clocks and credit unions than to the economic structure of the employing enterprise provides an unacceptable basis for determining sound unit structures. Because of these practical implications, as well as the conflict with prior decisions discussed above, this case merits the Court's review.

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[9] As Armco explains in its Petition for Certiorari in No. 87-1514 at pp. 16-17, the splintering of the bargaining unit will require the company to revert to its pre-acquisition practice of coke stockpiling, in order to attempt to mitigate the "possibility of unfair leverage" now enjoyed by the coke unit by ensuring that a work stoppage will not leave the steel works without a supply of coke when it is needed. Thus, if the decision below is allowed to stand, the $100,000,000 Armco paid for a failing coke plant will not have produced a dependable supply of coke for the Ashland Works.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

Nos. 86-5616/5707/5825/5826

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ARMCO, INC. (86-5616/86-5825),

UNITED STEELWORKERS OF AMERICA, LOCAL 1865
(86-5707/86-5826),

Petitioners
Cross-Respondents,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent
Cross-Petitioner.

On Petition for Review and Cross-Application for
Enforcement of an Order of the
National Labor Relations Board

Decided and Filed November 3, 1987

Before: MERRITT and MARTIN, Circuit Judges; and BROWN, Senior Circuit Judge.

BOYCE F. MARTIN, JR., Circuit Judge. Armco, Inc., and the United Steelworkers of America seek review of an order of the National Labor Relations Board finding them guilty of an overly-aggressive organizational effort in violation of the National Labor Relations Act.

This case arises from Armco's acquisition of an Allied Chemical coke plant in Ashland, Kentucky on December 31, 1981. Armco owned and operated a steel production plant only a few miles from the coke plant, and it paid $100 million to Allied with the idea of obtaining a constant and high-quality supply of coke for its Ashland blast furnaces.

The controversy arose from Armco's unilateral decision to accrete the coke plant workers to the Steelworkers' bargaining unit at the steel plant, and from its failure to recognize or bargain with the Oil, Chemical and Atomic Workers (OCAW) which had always represented the workers at the coke plant. This decision resulted in a meeting at which the coke workers were required to sign Steelworkers' dues checkoff cards if they wished to work for Armco. The National Labor Relations Board found that the coke workers represented a separate and appropriate bargaining unit and that Armco's actions constituted unfair labor practices in violation of sections 8(a)(1), (2), (3), and (5), and 8(d) of the National Labor Relations Act, 29 U.S.C.A. §§ 158(a)(1), (2), (3), and (5), and § 158(d). The Board also found that, by its actions, the Steelworkers had violated sections 8(b)(1)(A) and (b)(2) of the Act, 29 U.S.C. §§ 158(b)(1)(A) and (b)(2). This decision appears at 279 N.L.R.B. 143 (May 30, 1986), and it affirms the lengthy rulings of the administrative law judge.

For the reasons that follow, we affirm, and we order that the decision of the Board be enforced.

I. *FACTS*

For approximately 35 years, Allied Chemical Corporation was engaged in the production of coke and its by-products at the Ashland plant. Since 1952, that plant's employees were represented by the OCAW International Union, its Local 3-523, and OCAW's predecessor. The

most recent collective bargaining agreement between Allied and OCAW was effective from August 5, 1979 through May 14, 1982. During 1981, the coke plant produced 500 tons per day, nearly all of which was sold to Armco. But, because the plant's production capacity was 2800 tons per day, nearly two-thirds of the employees had been laid off.

The employees of Armco's Ashland Works had been represented by the Steelworkers since 1942, and their most recent contract was effective from March 1, 1983 through July 31, 1986. During 1981, Armco needed about 2800 tons of coke per day to operate its Ashland Works. The coke Armco did not buy from Allied was purchased on the open market.

In 1979, Allied decided to withdraw from the coke-producing business, and it began selling its facilities. In 1981, Armco began looking toward the purchase of the Ashland coke plant. Armco apparently considered a number of alternative methods of operating the plant, and it decided that the most efficient way would be to integrate the facility into its Ashland Works. There were two other alternatives: operating it as a self-standing unit, which Armco alleges would have caused redundancy in maintenance personnel and would have continued the need to stockpile coke as a hedge against production interruption; and purchasing assets only, allowing the company to hire new labor. The latter option was apparently rejected as incompatible with the strong union ethic predominant in Ashland. In addition, it would have been a great burden for Armco to train all new personnel.

In November 1981, Allied and Armco signed a letter of intent concerning the purchase. On November 25, two Allied representatives informed OCAW President Robert Goss of the purchase plan, telling him that Armco would not recognize the OCAW contract. Armco's Corporate Director, James Wallace, informed the Steelworkers District Director Edgar Ball that Armco wished to bring

the coke plant workers in under the Steelworkers contract and that the company would not recognize the OCAW. On November 30, Ball called Goss and related this development. Goss responded that, if satisfactory arrangements could be made with respect to job security, seniority, and pensions, the OCAW would consider releasing the employees.

Numerous conversations between the various parties ensued. The Steelworkers union was concerned that the OCAW might file raiding charges with the AFL-CIO. The OCAW's International Representative, Kenneth McKeand, said he intended to do everything in his power to keep the coke workers OCAW. It soon became clear, however, that the OCAW had little leverage against Armco. An Allied representative stated that, if Armco did not buy the plant, it would be shut down. Thus, despite an overwhelming vote among the coke workers to maintain their OCAW status and avoid accretion into the Steelworkers, the OCAW had no viable alternative because Armco was represented as "the only show in town."

A memorandum of understanding was signed between the Steelworkers and Armco on December 15, 1981, detailing the arrangements governing the purchase of the plant and the hiring of the coke workers. As a result, Armco offered to hire all of the Allied employees, recalling laid-off workers as production increased, with no probationary period required. The Allied workers, though, would all be given a new seniority date of December 31, 1981, and they all would be required to sign Steelworkers dues checkoff and authorization cards as a condition of employment. Although both Goss and McKeand initially objected to this requirement, they eventually told the coke workers to sign the cards rather than risk losing their jobs. At no time, however, did OCAW unconditionally release the employees to the Steelworkers, and at no time did the workers vote to be represented by the Steelworkers.

The sale was final on December 31, 1981, and, as of January 2, 1982, Armco began applying the terms of its bargaining agreement with the Steelworkers to the coke plant employees. Armco had purchased all of Allied's equipment, material, and supplies, and it operated the plant with the same machinery, equipment, and production methods previously used by Allied.

What then followed were disagreements and struggles within the OCAW itself, apparently caused by dissatisfaction of the Local members. In March 1982, the officers of the Local OCAW sent a letter to the Steelworkers denying that the coke plant was an accretion to the existing Armco unit, and the letter stated that the OCAW had never been notified of negotiations between Armco and the Steelworkers involving the coke plant employees. These negotiations involved the coke workers' terms and conditions of employment and resulted in lost pensions, wages, seniority, vacations, and benefits. The Steelworkers did not respond to the letter.

In his letter of March 18, OCAW President Goss announced a meeting to be held March 28 to determine the position of the members on the issue of whether the OCAW should assert bargaining rights. The letter stated that the OCAW had not previously asserted those rights because its primary concern had been to ensure job opportunities and recall rights. Approximately 300 members attended the meeting, and they voted unanimously to assert the OCAW's bargaining rights at the coke plant.

On April 5, a committee of Local OCAW members sent Armco a letter demanding that it negotiate with the OCAW. The union denied that the coke plant was properly accreted to Armco's Steelworkers bargaining unit, and it asserted that Armco's interest in dealing with a single union was outweighed by the rights of the employees to choose their own bargaining representative. Armco responded by letter on April 12. The company

refused to bargain with the OCAW committee on the ground that the coke workers were part of the Steelworkers bargaining unit.

Also on April 5, OCAW President Goss reported to the Local members that he was placing the Local union under the administratorship of an International representative. This change displeased Local members; through attorney Richard Bank, they filed an unfair labor practice charge against the OCAW International. The OCAW International then filed suit in federal court to enjoin the Local committee members from attempting to bargain on behalf of the OCAW. The district judge held a hearing on April 14 at which the various factions of the OCAW reached an agreement. The OCAW International agreed to file an unfair labor practice charge against Armco, and it agreed to attempt to regain bargaining rights. Bank agreed to withdraw the charges brought against the International. The court then entered an order denying the injunction against the Local, but the order did establish a limited administratorship for the purpose of holding an election of officers.

On April 15, the OCAW filed a charge against Armco, and the union made its first formal, authorized demand for recognition as the bargaining representative of the coke workers. The charge against the Steelworkers, which was consolidated with the charge against Armco, was filed by attorney Bank on June 14, 1982.

II. *PROCEEDINGS BELOW*

The administrative law judge upheld the OCAW's complaint against both the Steelworkers and Armco. He ordered that Armco cease granting recognition to the Steelworkers as the bargaining representative of the coke plant employees, cease giving effect to the collective-bargaining agreement between Armco and the Steelworkers for the coke workers, and cease giving effect to any dues checkoff authorizations in favor of the Steelworkers. He

also ordered that Armco and the Steelworkers jointly and severally reimburse the coke workers for dues unlawfully withheld since January 1, 1982, with interest. The administrative law judge then recommended that Armco reinstate the terms and conditions of employment for the coke workers that were in effect prior to Armco's unilateral changes. He also recommended that Armco reimburse the employees for any monetary loss suffered as a result. He specifically stated that Armco could not withdraw any benefits which had inured to the coke workers. He then ordered that Armco must bargain upon request with the OCAW as the exclusive representative of the workers in a bargaining unit defined as:

> All production and maintenance, all accounting clerical, office traffic clerical and stores clerical, plant chemist, research technicians, employees of the company at its Ashland, Kentucky [coke] plant, but excluding assistant plant controller, all employee relations department, plant buyer, storekeeper, draftsmen, and technicians of the plant engineering office, professional employees, guards and all supervisors as defined in the Labor-Management Relations Act, 1947.

As for the Steelworkers, the administrative law judge ordered that it cease giving effect to its collective bargaining agreement on behalf of the coke workers, cease accepting or deducting dues from the coke plant employees, and cease restraining or coercing the coke plant employees in the exercise of their rights guaranteed under Section 4 of the Act. He also held the Steelworkers liable for the reimbursement of the coke plant employees, with interest, for any dues deducted since January 1, 1982.

The recommendation and the remedial order were adopted by the National Labor Relations Board. (One of the three members of the panel dissented in part.)

III.

Both the Steelworkers and Armco argue on appeal that the Board abused its discretion in finding that the coke workers constituted a separate and appropriate bargaining unit and that, therefore, neither party violated the Act by its actions. The Steelworkers union also contends that the charge filed against it was untimely because it was filed beyond the six-month limitations period of section 10(b), 29 U.S.C. § 160(b). As mentioned above, we find that the OCAW's action was timely filed, and we hold that the Board did not abuse its discretion in finding the coke plant employees were a separate and appropriate unit.

A. *The Statute of Limitations*

The Steelworkers union attempts to rely on *United States Postal Service Marina Mail Processing Center*, 271 N.L.R.B. 397 (1984), to show that the OCAW had unequivocal notice of Armco's decision to recognize the Steelworkers as the coke workers' representative earlier than December 15, 1981, the date of the memorandum of understanding. We are not persuaded. While we agree with the Board's statement in that case, that the 10(b) period begins to run at the time an employee receives unequivocal notice of an adverse employment action rather than the time that action becomes effective, 271 N.L.R.B. at 400, we find that such an interpretation does not serve to bar the OCAW's action against the Steelworkers in this case.

Here, the Steelworkers union contends that the statutory period began to run on December 5, 1981, when Armco's manager informed OCAW representatives that Armco would treat the coke workers as an accretion to the Steelworkers unit and recognize the Steelworkers as their bargaining representative. As the Board points out in its brief, there is no evidence that the Steelworkers' representatives present at the December 5 meeting as-

sented to Armco's plan. At a meeting a few days earlier, the Steelworkers had expressed concern over being charged with violating the no-raiding provisions of the AFL-CIO constitution. The OCAW may reasonably have assumed that the Steelworkers would honor these provisions Thus, though the announcement at this meeting certainly provided the OCAW with notice of Armco's intent, we cannot construe it to have constituted unequivocal notice of what the Steelworkers planned to do. We find that such unequivocal notice only occurred on December 15, 1981, when the Steelworkers signed the memorandum of understanding with Armco. Thus, the June 14, 1982 charge against the Steelworkers was filed within the six-month time period of section 10(b).

B. *Accretion versus a separate and appropriate unit.*

Both the Steelworkers and Armco contend that the Board improperly determined that the coke plant employees constituted a separate and appropriate bargaining unit and that, therefore, the employees were properly represented by the Steelworkers. We disagree, and we hold that the Board's designation of the coke plant workers as an appropriate unit was correct.

To determine whether two groups of employees should be included in the same bargaining unit, the Board applies a "community of interest" test: the two groups must share a "community of interests sufficient to justify their mutual inclusion in a single bargaining unit." *Pacific Southwest Airlines v. NLRB*, 587 F.2d 1032, 1038 (9th Cir. 1978). This test consists of several factors: (1) similarity in skills, interests, duties, and working conditions; (2) functional integration of the plant, including interchange and contact among the employees; (3) the employer's organizational and supervisory structure; (4) the bargaining history; and, (5) the extent of union organization among the employees. *NLRB v. American Seaway Foods*, 702 F.2d 630, 633 (6th Cir. 1983). "Employee desires," an additional factor frequently included

in other circuits, is not a relevant factor in this circuit. *NLRB v. Pinkerton's, Inc.*, 428 F.2d 479, 484 (6th Cir. 1970).

Because of its wide experience, the Board should be given some deference in its selection of an appropriate bargaining unit through the application of the "community of interests" test. *South Prairie Construction Co. v. Local 627, Operating Engineers*, 425 U.S. 800 (1976). The Board's ultimate determination as to the appropriate unit must be upheld unless it is arbitrary, unreasonable, or an abuse of discretion. *NLRB v. American Seaway Foods, Inc.*, 702 F.2d at 632. But we review the Board's factual conclusions regarding the individual factors with less deference. The National Labor Relations Act provides the standard of review of such factual determinations: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record as a whole shall be conclusive." 29 U.S.C. § 160(a).

We believe the Board's finding that the coke workers constituted a separate, appropriate bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion. Further, we believe that the Board's intermediate, factual conclusions, which form the basis for its ultimate determination, are supported by substantial evidence.

The administrative law judge's conclusion that the two employee groups had dissimilar skills, duties, and working conditions is clearly supported by substantial evidence. All parties have acknowledged that the coke workers possess different skills, and that they work in a more hazardous environment than most steelworkers. Moreover, though the coke workers are not necessarily more skilled or better trained, their training is significantly different. This discrepancy surely was one of the reasons Armco chose to hire the Allied employees rather than an entirely new work force. In addition, the carcinogenic conditions existing in the coke plant are a constant haz-

ard to the coke workers, and, therefore, constitute a legitimate ground for separate bargaining.

Armco argues that the second factor, functional integration, was wrongly decided by the administrative law judge to militate against a finding of accretion. Armco emphasizes the continuous nature of the process for coke plant to finished product. We are not persuaded.

Formerly, the coke workers unit was an independent, separate plant with a long bargaining history and a long union relationship. This fact alone suggests the appropriateness of a separate bargaining unit. *Bay Medical Center, Inc. v. NLRB*, 588 F.2d 1174, 1177 (6th Cir. 1978) ("Courts have long recognized that the Board may take bargaining history into account when determining whether a proposed bargaining unit is appropriate."). No machinery has been transferred between the plants, and the coke plant continues to maintain its own telephone exchange, credit union, and time clock. Moreover, the coke workers continue to perform the same work, by the same methods, and using the same machinery as before Armco's purchase. Most employees also have the same supervisors. The only real change has been an increase in production, a change which does not alter the nature of the employing industry.

In addition, the lack of employee interchange between plants militates against a finding of functionl integration. *NLRB v. American Seaway Foods, Inc.*, 702 F.2d at 635. Out of a workforce of 2700 steelworkers, only 24 maintenance employees have any contact with the coke workers. Such a small, one-way exchange fails to undermine the appropriateness of the coke plant as a separate bargaining unit. *See Victoria Station, Inc. v. NLRB*, 586 F.2d 672, 675 (9th Cir. 1978). Furthermore, the hazardous conditions in the coke plant substantially decrease the possibility that steel plant employees would seek to transfer to coke plant jobs.

This fundamental problem, a lack of employee interchange, is exacerbated by the fact that all of the coke workers have a seniority date of December 31, 1981. In relation to the majority of the steelworkers, the coke workers have no seniority. Therefore, it is unlikely that any of the coke workers will be able to transfer in the near future. Thus, Armco's claim that it has done the coke workers a great favor by giving them the possibility of transferring to a more desirable division is not borne out in reality.

The company also argues that the administrative law judge incorrectly assessed the two union's bargaining histories. Although both the steel and coke industries have a history of independent union organization, Armco emphasizes that, in the steel industry, there are no steel plants in which the coke plant workers are represented by a separate union.

This argument is unavailing. Armco has failed to cite any case in which a previously-independent coke plant has been acquired and the employees accreted to a preexisting steelworkers bargaining unit. Furthermore, the case upon which it primarily relied, *Granite City Steel Co.*, 137 N.L.R.B. 209 (1962), can be readily distinguished. First, *Granite City* involved only 16 original powerhouse employees in contrast to the 400 employees in this case. Second, the wind and steam produced by the powerhouse workers are not commodities, like coke, which can be purchased in the open market. Moreover, these elements, which are used to operate blast furnaces, are arguably more integral to the steelmaking process. Finally, the powerhouse employees in *Granite City* had previously belonged to a bargaining unit which represented all of the powerhouse employees of the Union Electric Company; they had no history as a separate bargaining unit. These factors made a single bargaining unit appropriate in *Granite City*. Here, however, including the coke workers and the steelworkers in the same

bargaining unit would compromise the coke workers' section 7 rights "to self organization . . . [and] to bargain collectively through representatives of their own choosing. . . ." 29 U.S.C. § 157.

Admittedly, the third factor, the employer's organizational structure, may militate in favor of accretion. We concede that Armco exhibited centralized hiring procedures, and it demonstrated that wages, hours, and terms of employment were generally uniform.

But such proof does not undermine the reasonableness of the Board's determinations. As of the date of the hearing, no new employees had been hired. More importantly, the uniformity in wages, hours, and terms of employment is the result of the disputed conduct: the application of the Steelworkers' contract to the coke plant employees.

In sum, we hold that the Board's finding that the coke workers constituted a separate and appropriate bargaining unit was not arbitrary, not unreasonable, and not an abuse of its discretion. Furthermore, we hold that the factual conclusions which formed the basis of this determination are supported by substantial evidence. Therefore, by treating the employees at the coke plant as an accretion to the steel plant unit, Armco and the Steelworkers violated the Act.

C. *Requiring employees to execute Steelworkers dues checkoff and authorization cards as a condition of employment.*

It is well settled that the dues checkoff provisions are intended to be an area of voluntary choice for the employee. *NLRB v. Atlanta Printing Specialties*, 523 F.2d 783, 787 (5th Cir. 1975). Threats by either a union or an employer that employees will be discharged for failure to sign checkoff authorization cards violates the Act. *Metal Workers' Alliance, Inc.*, 172 N.L.R.B. 815, 817

(1968). Thus, as long as the Board's factual finding that Armco and the Steelworkers compelled the coke plant employees to sign the cards as a condition of employment is supported by substantial evidence on the record as a whole, we must affirm the Board's conclusion of violation. 29 U.S.C. § 160(a).

The evidence demonstrates that the Board's finding is supported by the record as a whole and is entitled to affirmance. Three former Allied employees testified on the record that, during a January 1982 orientation session, they were told that they had to sign checkoff and authorization cards if they wanted to work at Armco. A fourth coke plant employee, recalled from layoff in March 1982, testified that a similar statement was made in an orientation session following his recall. He specifically testified that he signed the checkoff authorization only because he believed he had to do so to get a job. Armco manager J. Edward Maddox admitted that he had taken the position that coke plant employees had to sign the card to work for Armco. The administrative law judge expressly discredited Armco supervisor Herb Salyer's testimony that he had not made statements which employees specifically remembered him making.

We believe that this testimony constitutes substantial evidence to support the Board's finding that Armco and the Steelworkers compelled the employees to sign the union's dues checkoff and authorization cards as a condition of employment. Thus, we affirm the Board's finding that Armco violated sections 8(a)(1), (2) and (3) of the Act and that the Steelworkers violated sections 8(b)(2) and (b)(1)(A).

D. *Armco's failure to recognize the OCAW*

As we have already stated, we believe the Board correctly concluded that Armco was a successor employer and that the coke plant remained an appropriate unit even after the Armco purchase. Under these circumstances,

we have no difficulty in finding that Armco violated sections 8(a)(5) and (1) of the Act by failing to recognize and bargain with the OCAW as the representative of the coke workers before making unilateral changes in their working conditions.

The facts fail to support Armco's contention that the OCAW waived its bargaining rights. In any case, such a waiver of a statutory right must be in "clear and unmistakable language." *Timken Roller Bearing Co. v. NLRB*, 325 F.2d 746, 751 (6th Cir 1963). An unambiguous waiver was not evident in this case.

Therefore, as was the case in *NLRB v. Burns Security Services*, 406 U.S. 272, 279-80 (1972), the bargaining unit remained unchanged, and Armco was not entitled to upset the union majority by recognizing another union.

We believe there was substantial evidence to support the Board's conclusion that Armco violated sections 8(a)(5) and (1).

IV. *Conclusion*

In essence, Armco and the Steelworkers have asked for leniency based on the current adverse economic climate of the steel industry. Their plea also emphasizes the charitable nature of Armco's act of buying a suffering plant and hiring its entire workforce. We have no doubt that Armco stepped in at a crucial moment in the lives of the coke workers and Allied, and we sympathize with the plight of those in the steel industry. We also recognize that the relatively small size of the coke workers bargaining unit creates a possibility of unfair leverage. None of these factors, however, justifies the flagrant refusal of Armco and the Steelworkers to recognize and bargain collectively with the OCAW.

It has come to our attention that the remedy ordered against Armco may be too harsh, for it would require the company to pay wages perhaps as much as three

dollars per hour more than the coke workers have been receiving since the time of the plant's purchase. In *Kallman v. NLRB*, 640 F.2d 1094 (9th Cir. 1981), the court set aside part of a similar remedial order and remanded the matter to the Board. The court there found that "[t]he function of the remedy . . . is to restore the situation, as nearly as possible, to that which would have occurred but for the violation." *Id.* at 1103, *citing Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941). In *Kallman*, the facts indicated that the employer would not have agreed to union demands to pay the higher rate.

We believe that the same may be true in this case. Thus, we hold that the employer is responsible for the pay difference for the time which would have been required for bargaining. We will remand this matter to the National Labor Relations Board, however, for the factual determination required to decide the extent of backpay. As the court did in *Kallman*, we will leave it to the Board's discretion whether the resolution of these issues should be left to bargaining between the parties.

Therefore, with the exception of the backpay award, we affirm the findings of the National Labor Relations Board, and we grant enforcement of its order.

PERTINENT SECTIONS OF THE NATIONAL LABOR RELATIONS ACT

Sections 8 and 9 of the National Labor Relations Act, as amended, 29 U.S.C. § 158, 159, provide in pertinent part:

§ 158. Unfair labor practices

(a) Unfair Labor practices by employer

It shall be an unfair labor practice for an employer:

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . .;

(3) by discrimination in regard to hire, tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .;

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title;

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents:

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . . . ;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section or to discriminate

against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

* * * * *

§ 159. Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . .

(b) Determination of bargaining unit by Board

The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof . . . .